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ABSTRACT

The document reports on five new cases and updates information on 29 previously reported cases regarding mental retardation and the law. Cases are divided into the following categories: classification, commitment, confidentiality, education, employment, protection from harm, sterilization, treatment, and zoning. Listed separately, by the above categories, are cases with no new developments or closed cases reported earlier. Also provided is an article titled "The Retarded Offender and Corrections" by M. Santamour and B. West. (SBH)

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MENTAL RETARDATION and the LAW

U.S. DEPARTMENT OF HEALTH, EDUCATION & WELFARE
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PRESIDENT'S COMMITTEE ON MENTAL RETARDATION

A Report on Status of Current Court Cases

October 1978

This issue of "Mental Retardation and the Law" contains reports on 5 new cases (indicated as new in the text by an asterisk) and updated information on 29 cases reported in previous issues. Also included is an article, entitled THE RETARDED OFFENDER AND CORRECTIONS by Miles B. Santamour and Bernadette West

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TABLE OF CONTENTS

		Page
I.	CURRENT CASES	1
A.	CLASSIFICATION	1
	California: Larry P. v. Riles	1
B.	COMMITMENT	1
	District of Columbia: Poe v. Califano	1
	Georgia: Parham, et al. v. J.L. and J.R.	1
	Pennsylvania: Institutionalized Juveniles v. Secretary of Public Welfare [formerly Bartley v. Kremens].....	2
C.	CONFIDENTIALITY	2
	Michigan: Phoenix Place, Inc., et al. v. Michigan Department of Mental Health *	2
D.	EDUCATION	3
	Arizona: Eaton v. State of Arizona	3
	Connecticut: Connecticut Association for Retarded Citizens v. State Board of Education	3
	Connecticut: Stuart v. Nappi, et al.	4
	Indiana: Doe v. Grile *	4
	New Jersey: New Jersey Association for Retarded Citizens v. New Jersey Department of Human Resources	4
	New York: Woods, et al. v. New York City Board of Education *.....	4

* Cases reported for the first time in this issue are marked with an asterisk.

Page

North Carolina: North Carolina Association for Retarded Children v. State of North Carolina 5

Tennessee: Rainey v. Tennessee Department of Education 5

Virginia: Kruse v. Campbell 6

Wisconsin: Panitch v. State of Wisconsin 6

E. EMPLOYMENT

Tennessee: Townsend v. Clover Bottom Hospital and School 7

F. PROTECTION FROM HARM

Michigan: Michigan Association for Retarded Citizens, et al. v. Smith, et al. 7

New York: New York State Association for Retarded Citizens v. Carey 7

Pennsylvania: Romeo v. Youngberg 8

G. STERILIZATION 8

District of Columbia: Relf v. Weinberger; National Welfare Rights Association, et al. v. Weinberger 8

H. TREATMENT 8

Alabama: Wyatt v. Hardin 9

District of Columbia: Evans and the United States v. Washington, et al. 9

District of Columbia: Kentucky Association for Retarded Citizens, et al. v. Califano * 9

Page

Florida: Donaldson v. O'Connor 10

Louisiana: Gary W. v. Cherry, et al. 11

Maine: Wuori v. Zitnay 11

Massachusetts: Brewster v. Dukakis 13

Minnesota: Welsch v. Dirkswager 13

Missouri: Barnes, et al. v. Robb, et al. 13

Missouri: Caswell v. Califano 13

Montana: United States v. Mattson 13

New Jersey: In the Matter of C.S. 14

Washington: Washington Association for Retarded Citizens v. Thomas * 14

I. ZONING

Virginia: INSIGHT, Inc., et al. v. City of Manassas, et al. 14

II. CASES WITH NO KNOWN NEW DEVELOPMENTS AND CLOSED CASES REPORTED IN EARLIER ISSUES OF "MENTAL RETARDATION AND THE LAW" 15

III. FEATURE ARTICLE: THE RETARDED OFFENDER AND CORRECTIONS 25

I. CURRENT CASES.

A. CLASSIFICATION

CALIFORNIA: Larry P. v. Riles, Civil No. C-71-2270 RFP, 343 F. Supp. 1306 (N.D. Cal. 1972), aff'd, 502 F.2d 963 (9th Cir. 1974), further briefs filed April 1978.

This case challenges the use of culturally biased IQ tests to diagnose and place black children in classes for the educable mentally retarded. In its post-trial brief filed on April 17, 1978, the United States as amicus curiae asked the court to enjoin the use of standardized IQ tests which are found to be culturally biased for diagnosis of mental retardation in black children in California public schools and to enjoin the use of such test results to place black children in public school EMR classes. It is proposed that defendants must affirmatively establish that standardized IQ tests, other than ones found by the court to be culturally biased, are not culturally biased and are valid for the purpose utilized. The United States also seeks evaluation by defendants of each black child already placed in public school EMR classes and that each such child be accorded the remedial education necessary to provide him an opportunity to function in regular classes.

B. COMMITMENT

DISTRICT OF COLUMBIA: Poe v. Califano, Civil No. 74-1800 (D.D.C., July 26, 1978).

After a two-year stay, the court heard oral argument on plaintiffs' pending motion for summary judgment on May 15, 1978. At that time the Federal defendants and the District of Columbia as amicus curiae conceded the unconstitutionality of the statute at issue. Thereupon, the court instructed the parties to propose an order "assuming that the Court would hold the statute unconstitutional."

Following a number of submissions by the parties and a period of court-assisted negotations, the court filed in the record on July 26, 1978, a proposed order and gave the parties two weeks for objections and responses. The case is now under submission.

GEORGIA: Parham, et al. v. J.L. and J.R., 412 F. Supp. 112, 412 F. Supp. 141 (M.D. Ga. 1976), probable juris. noted, 431 U.S. 936 (1977), order for rehearing entered, Jan. 16, 1978 (No. 75-1690).

The new argument before the Supreme Court has been set for October 10, 1978. Institutionalized Juveniles v. Secretary of Public Welfare (reported previously as Bartley v. Kremens) will be heard at the same time.

PENNSYLVANIA: Bartley v. Kremens, 402 F. Supp. 1039 (E.D. Pa. 1975), vacated and remanded 431 U.S. 119.(1977), on remand sub nom. Institutionalized Juveniles v. Secretary of Public Welfare, No. 72-2272 (E.D. Pa., May 25, 1978).

In 1977 the United States Supreme Court remanded this case "for consideration of the class definition, extension of those whose interests are material, and substitution of class representatives with live claims." 431 U.S. at 135.

On May 25, 1978, the three-judge district court entered its judgment and order. It recognized two subclasses of plaintiffs (all juveniles under the age of 14 committed as mentally ill to mental health facilities; all juveniles under the age of 18 committed as mentally retarded to mental health facilities); declared unconstitutional sections of the Pennsylvania Mental Health and Mental Retardation Act of 1966 and the Mental Health Procedures Act of 1976; and enjoined defendants from accepting or continuing the admission or commitment of members of the subclasses to Pennsylvania facilities unless certain due process procedures are provided, including notice of probable cause and full commitment hearings, counsel or other trained representative during all steps of the commitment procedure, presence of the juvenile at all commitment hearings, opportunity to be heard, opportunity to present witnesses and to cross-examine adverse witnesses, a finding by clear and convincing proof that the juvenile is in need of institutionalization, probable cause hearings held within 72 hours and full commitment hearings within a week of initial detention. Children who are members of the defined subclasses already admitted or committed are to be either discharged or released or recommitted according to the procedures outlined in the order within 180 days of the date of the order.

The State has appealed, and the Supreme Court has set oral argument for October 10, 1978 (with Parham).

C. CONFIDENTIALITY

MICHIGAN: Phoenix Place, Inc., et al. v. Michigan Department of Mental Health,* Civil No. 77 73 200 CW (Cir. Ct., Wayne Cty., Mich., June 20, 1978).

Plaintiffs in this class-action suit are Phoenix Place, Inc., a nonprofit corporation which contracts with the Michigan Department of Mental Health through the Wayne County Mental Health Board to supply services to mentally retarded and developmentally disabled clients of that organization. Defendants are the director and members of the Department of Mental Health. Plaintiff Phoneix Place serves approximately 250-400 mentally retarded and developmentally disabled people in Wayne County, Michigan.

The case was initiated by a petition for preliminary injunction seeking to enjoin defendants from entering and administering the Program Assessment Chart, a series of evaluative forms required by the State Department of Mental Health for measuring clients' progress, claiming that use of such forms comprising the PAC is unconstitutionally intrusive upon the right of privacy of mentally retarded and developmentally disabled persons who receive mental health services through the Department.

In its opinion of June 20, 1978, the court found that the PAC required excessively intrusive observations of mentally retarded persons, conformity to arbitrary standards and a treatment of mentally retarded persons inconsistent with the State Mental Health Code which requires that clients of the Department be treated with human dignity.

In granting the preliminary injunction, the court noted that "[t]o many of the retarded, the institution which cares for them is the family [or] family members who are cooperating with various institutions for their care. It seems clear, therefore, that there is a constitutional right of privacy vested in the mentally retarded in relationship to the persons who are providing training and treatment for them." In order to complete questions on the mandated forms "members of the family become governmental agents, spying on their kin, and if the observations are made by officials of the government, it calls for impermissible spying and intrusion upon very personal matters....To say there is a compelling state interest in such intrusion is simply saying that the principles of privacy are not applicable to the mentally retarded."

D. EDUCATION

ARIZONA: Eaton v. State of Arizona, Civil No. 329028 (Superior Ct., Maricopa Cty., Ariz., filed December 10, 1975).

The trial court denied the defendants' motions to decertify the plaintiff and defendant classes and some of the defendants have appealed the refusal to decertify the defendant class. A motion to dismiss the appeal has been briefed and is pending in the Arizona Court of Appeals. Discovery is continuing in the trial court.

CONNECTICUT: Connecticut Association for Retarded Citizens v. State Board of Education, Civ. No. H77-122 (D. Conn., filed March 10, 1977).

As a result of the institution of this suit, the Connecticut General Assembly repealed the challenged statutory provision (§ 10-76a(f) of the Connecticut General Statutes). The repeal is effective September 1, 1978.

Counsel for plaintiffs are currently preparing a consent decree.

CONNECTICUT: Stuart v. Nappi, et al., 443 F. Supp. 1235 (D. Conn. 1978).

Local defendant's motion to dismiss was denied on May 10, 1978.

Although plaintiffs filed their first set of interrogatories on January 27, 1978 and a motion to compel answers on March 10, 1978, discovery is being held in abeyance pending the court's decision on defendants' motion to deny class certification (as a matter of law, i.e., without any investigation of the particular facts in the case). Plaintiffs plan to move for class certification after discovery.

INDIANA: Doe v. Grile,* Civil No. F77-108 (N.D. Ind. April 24, 1978).

Plaintiffs in this class-action suit are 113 severely retarded children who claim that the State has failed to provide appropriate special education services for them due to inadequate numbers of special education teachers and an inadequate level of resources. Their claims are based on P.L. 94-142, the Education of All Handicapped Children Act, and § 504 of the Rehabilitation Act of 1973.

On April 24, 1978, the court dismissed all claims based on P.L. 94-142, stating that there could be no cause of action under the statute until September 1, 1978. Plaintiffs' motion for a preliminary injunction was denied on May 18, 1978. The case is currently pending trial on the merits.

NEW JERSEY: New Jersey Association for Retarded Citizens v. New Jersey Department of Human Resources, No. C2473-76 (N.J. Super. Ct., Ch. Div., Hunterdon Cty., filed March 14, 1977).

On July 7, 1978, trial in this case was postponed for three months over the objections of the plaintiffs. The Department has alleged that it is making substantial changes at Hunterdon State School, and the court is allowing time for the alleged changes to be effected.

NEW YORK: Woods, et al. v. New York City Board of Education, et al.,* (E.D.N.Y., filed August 3, 1978).

Plaintiffs in this suit are two mentally retarded children who are Hepatitis B carriers. Defendants are the Board of Education, two public school principals and the chairman of the Commission of the Handicapped District 27.

The complaint alleges that the two named plaintiffs were suspended from public school solely because they were Hepatitis B carriers; that they were not afforded a due process hearing; and that they were not provided with any instruction, including home instruction, at any time during the suspensions.

The complaint seeks declaratory relief pursuant to 20 U.S.C. § 1415, 29 U.S.C. § 794, 42 U.S.C. § 1983, the 14th Amendment to the Constitution and pendent state laws and regulations. It also seeks monetary damages.

NORTH CAROLINA: North Carolina Association for Retarded Children, et al. v. State of North Carolina, et al., Civil No. 3050, 420 F. Supp. 451 (E.D.N.C. 1976), consent decree entered, July 31, 1978.

On July 31, 1978, the federal district court for the eastern district of North Carolina (Judge Dupree) entered a consent decree agreed upon by the parties as to the right of each plaintiff to a free and appropriate public school education. The decree provides, inter alia, that defendants shall comply in every respect with the Education for All Handicapped Children Act and § 504 of the Rehabilitation Act of 1973; that a plan of compensatory education shall be drawn annually to provide adequate educational services to those beyond school age; and that a three-member review panel will monitor compliance. All allegations relating to alleged constitutional deprivations in the five North Carolina mental retardation centers remain pending. The court has declined to certify the case as a class action.

TENNESSEE: Rainey v. Tennessee Department of Education, No. A-3100 (Tenn. Ct. of Appeals, August 7, 1978).

On August 7, 1978, the Chancery Court for the Davidson County at Nashville, Tennessee, issued a Memorandum Opinion on relief sought by the plaintiff class concerning residency requirements for the education of deinstitutionalized handicapped children and the due process and least restrictive environment issues involved in the case.

Chancellor Cantrell ruled that the State of Tennessee has the ultimate responsibility for providing special education services for handicapped children and that the county from which the children came or in which the parents reside is immaterial. The defendants were enjoined from using the legal residence of parents to restrict provision of special education services for handicapped children who were deinstitutionalized from developmental centers operated by the Tennessee Department of Mental Health. A ruling was also made ordering the defendants, within 30 days, to implement the present due process hearing mechanism under the Right to Education Office to education decisions by State-operated schools which are subject to regulatory control of the State Department of Education. Defendants are required to report to the Court within 60 days the manner in which compliance with this requirement has been effected. Defendants are also ordered to report to the court within 30 days the identity of all State-operated schools which are not subject to regulatory control of the State Department of Education and/or the State Board of Education, the method for admission of a handicapped child to each school and the defendants' plan for assuring compliance by said schools with the due process requirements.

The court also enjoined the defendants from enforcing or relying on Tenn. Code Ann. § 49-2013(B) which allowed legally blind children, through their parents, to choose between education in regular classes and the Tennessee School for the Blind. The Chancellor ruled that the placement of the child at the Tennessee School for the Blind would violate federal requirements of a least restrictive environment and the equal protection clause of the 14th Amendment to the United States Constitution, if the blind child can be provided an appropriate education in the local school system.

VIRGINIA: Kruse v. Campbell, 431 F. Supp 180 (E.D. Va.), vacated and remanded, 98 S. Ct. 38 (1977), ___ F. Supp ___ (E.D. Va., Jan. 5, 1978).

On October 3, 1977, the United States Supreme Court vacated the three-judge court decision of March 23, 1977, and remanded the case for consideration of the claim based on § 504 of the Rehabilitation Act of 1973. On January 5, 1978, the United States District Court for the Eastern District of Virginia ruled for defendants, stating that under § 504 private school funding for handicapped children is not required before September 1978 and that implementation of § 504 before September would be impractical.

Counsel for plaintiffs filed an appeal with the Fourth Circuit, but the Virginia legislature has since revised its tuition reimbursement statute to plaintiffs' satisfaction. Accordingly, no further legal action is contemplated.

WISCONSIN: Panitch v. State of Wisconsin, 371 F. Supp. 935, 390 F. Supp. 611 (E.D. Wis. 1974), 444 F. Supp. 320, 76 F.R.D. 608 (E.D. Wis. 1977), per curiam order, April 18, 1978.

On November 21, 1977, a three-judge district court granted plaintiff's motion for summary judgment, declaring that defendants' policies and practices denied plaintiff class an education at public expense in violation of the equal protection clause of the 14th Amendment. The court ordered defendants "to provide all the members of the plaintiff class [handicapped educable children between 4 and 20] with an education at public expense which is sufficient to their needs and generally equivalent to the education provided to nonhandicapped children."

In a per curiam decision of April 18, 1978, plaintiffs' motion for a special master was denied, as was one joint city school district's motion to dismiss. Attorney's fees and guardian ad litem fees were awarded in the same order.

E. EMPLOYMENT

TENNESSEE: Townsend v. Clover Bottom Hospital and School, No. A-2576 (Chancery Ct., Nashville, Tenn. 1974), 513 S.W.2d 505 (Tenn. Sup. Ct. 1974), appeal dismissed and certiorari denied June 9, 1975, case remanded to Chancery Court.

Plaintiffs filed a Petiton for Certiorari in the United States Supreme Court in April 1978 (Docket No. 77-6572); the petition was denied on June 5, 1978.

F. PROTECTION FROM HARM

MICHIGAN: Michigan Association for Retarded Citizens, et al. v. Smith, et al., Civil No. 870384 (S.D. Mich., filed Feb. 21, 1978).

In June plaintiffs filed their amended complaint, which basically seeks the kind of relief granted in Pennhurst. Plaintiffs maintain that meaningful rehabilitative services cannot be given mentally retarded persons in large institutional settings. The constitutional and statutory equal protection thrusts are particularly significant in Michigan because of the presence of the Macomb-Oakland Regional Center. That Department of Mental Health facility has all but 90 of its several hundred residents in community placements, many of which it runs, nearly all of which it funds and supervises. Plymouth Center residents are a comparable population but do not have access to a comparable program.

Defendants have filed an Answer, contesting both a "right to community placement" and the suitability of many Plymouth Center residents for community placement. Discovery is just now beginning.

NEW YORK: New York State Association for Retarded Citizens v. Carey [Willowbrook], 357 F. Supp. 752 (E.D.N.Y. 1973), 393 F. Supp. 714 (E.D.N.Y. 1975).

In March 1978, the court affirmed a Review Panel recommendation calling for an additional two staff members of the Consumer Advisory Board, one of the advisory bodies monitoring implementation of the consent judgment. The State appealed that order and is arguing in the Court of Appeals for a very narrow interpretation of the power of the Review Panel, the key implementation mechanism. Argument is set for October 1978.

The State has also asked the District Court to modify the "Stipulation and Order on Consent" that settled a previous contempt motion so that they need only make 50 community placements per month instead of 100 as ordered. They have argued that 100 is impossible. Most plaintiffs oppose the motion unless the court orders automatic fines for noncompliance. Argument is set for September 11, 1978.

The court also decided that that portion of the "Stipulation and Order on Consent" that provided for a private agency to take over buildings at Willowbrook did not violate the State constitution or statutes. The Union, which has been joined for this issue, has filed a Notice of Appeal.

PENNSYLVANIA: Romeo v. Youngberg, Civil No. 76-3429 (E.D. Pa., April 28, 1978).

After a jury verdict in favor of defendants entered April 28, 1978, plaintiff appealed to the Third Circuit. The principal issue raised by plaintiff in his appeal is the trial court's refusal to permit plaintiff to introduce any expert testimony developing a causal relationship between defendants' lack of programming at the Pennhurst State School and Hospital and the physical attacks on the plaintiff by other residents of the hospital.

G. STERILIZATION

DISTRICT OF COLUMBIA: Relf v. Weinberger; National Welfare Rights Association, et al. v. Weinberger, 372 F. Supp. 1196 (D.D.C. 1974), 403 F. Supp. 1235 (D.D.C. 1974), 565 F.2d 722 (D.C. Cir. 1977).

Final regulations on sterilizations financed by programs funded by the Department of Health, Education and Welfare are expected to be published in the fall.

H. TREATMENT

ALABAMA: Wyatt v. Hardin, 344 F. Supp. 373, 378 (M.D. Ala. 1972) (subsequent citations omitted).

Discovery relating to Alabama's mental retardation facilities was reopened, and the parties were granted until October 1, 1978, to complete discovery. Discovery has been ongoing for the last several months with plaintiffs and amici propounding interrogatories, taking depositions and making tours of Partlow and the State's three developmental centers for the mentally retarded with experts in the mental retardation field.

The court conducted a hearing on August 28, 1978, in connection with a series of motions filed by plaintiffs, amici and the defendants. Among the motions heard and denied by the court was the defendants' motion to dissolve or modify the court's Order of April 13, 1972 in light of the Supreme Court decision in O'Connor v. Donaldson.

At the hearing, the court reaffirmed that plaintiffs and amici's discovery would close on October 1, 1978; however, the defendants were granted an additional 30 days for discovery.

Plaintiffs' and amici's motions for further relief and for the appointment of a special master, as well as the motion for amicus curiae United States for an amended medication standard, were set for a hearing on their merits on November 20, 1978.

DISTRICT OF COLUMBIA: Evans and the United States v. Washington, et al., Civil No. 76-0293 (D.D.C., June 14, 1978).

On June 14, 1978, Judge Pratt entered a Final Judgment and Order in this case. The court found defendant District of Columbia officials to have violated the constitutional rights of mentally retarded residents of Forest Haven, Laurel, Maryland, under the fifth and eighth amendments, to adequate treatment and habilitation in the setting least restrictive of individual liberty and to freedom from harm.

Plaintiffs, the United States as plaintiff-intervenor, and defendants negotiated the Order which was entered by the court. The Order enjoins defendants to develop and provide each of the 1100 class members with an individualized assessment of his/her abilities and needs, and with an habilitation program. Of particular significance is defendants' duty to develop and create the necessary community-based placements to provide all class members with community living arrangements, day programs and services as are suitable to each.

The mechanism through which the necessary planning for implementation of the Order is to be accomplished is the appointment by defendants of a Developmental Disabilities Professional (DDP) with a qualified staff. Plaintiffs and plaintiff-intervenor are to participate in the selection of the DDP and in determining the criteria for selection of the DDP and his/her staff. Defendants and the DDP must submit plans for implementation of the Order for the Court's approval.

Defendants are also enjoined to remedy constitutional violations in the institution, involving, e.g., inadequate medical care, improper use of seclusion, restraint and psychotropic medication, unsafe, inhumane living conditions, inadequate staffing, staff/resident abuse and resident injury caused by other residents, in order to safeguard residents during the period of transition to the community.

DISTRICT OF COLUMBIA: Kentucky Association for Retarded Citizens, et al. v. Califano,* Civil No. 78-1398 (D.D.C., filed July 31, 1978).

Plaintiffs in this class-action suit are the Kentucky Association for Retarded Citizens and four named mentally retarded persons. Defendants are Secretary of Health, Education and Welfare Joseph A. Califano, Jr., the Administrator of Health Resources Administration of HEW and the Regional Health Administrator of HEW Region IV.

The complaint alleges that Secretary Califano has assured Medicaid funding for Outwood, a "large, remote, total institution for the cus-

tody of mentally retarded persons" near Dawson Springs, Kentucky, "contrary to the federal government's policy in favor of deinstitutionalization of mentally retarded persons. The mentally retarded plaintiffs, it is alleged, need care and rehabilitation in a more normal, less restrictive environment than the new instituiton would provide.

The complaint charges Secretary Califano with violation of statutory and constitutional obligations in approving federal funding for the facility and requests a court order requiring his review of the State's approval of the institution. Plaintiffs seek to require Secretary Califano to enforce strictly federal laws which mandate strong justification for investment in new institutional facilities.

FLORIDA: Donaldson v. O'Connor, 422 U.S. 563 (1975).

On July 11, 1978, District Court Judge William Stafford issued an order ruling in plaintiff's favor on each of four issues relating to the determination of reasonable attorney's fees under the Civil Rights Attorney's Fee Awards Act of 1976. Specifically, the court ordered that:

1. The hourly rate at which fees for plaintiff's attorneys should be computed is not limited to the hourly rate in salary or similar compensation paid to plaintiff's attorneys by their employers (who are non-profit corporations) during the conduct of this litigation. Furthermore, such hourly rate should not be limited by the fee schedule established under the Criminal Justice Act, especially in a case as significant as this.

2. In view of the fact that plaintiff Donaldson secured his release from Florida State Hospital after bringing this case, and that this case has been of great value in clarifying the constitutional rights of civilly committed mental patients throughout the nation, plaintiff's attorney's fees in this case are not to be limited to the amount paid to plaintiff in settlement of his damages action.

3. Plaintiff is entitled to recover fees for all work reasonably related to the litigation of this case, including but not limited to all work reasonably related to securing plaintiff's release from Florida State Hospital; securing the jury verdict that defendants had violated plaintiff's constitutional rights and were liable in damages; defending the jury verdict on appeal to the Fifth Circuit and the Supreme Court; securing a damages settlement from defendants; and researching issues relating to the entitlement of attorney's fees and the determination of the amount of reasonable attorney's fees which should be awarded in this case. The

core of the reasonable fees calculation shall be determined by multiplying the number of hours of work performed as determined above times an appropriate hourly rate, based upon the hourly rate which attorneys of comparable experience and ability would receive for other complex litigation. Once this core amount of reasonable fees has been calculated, it shall then be adjusted in light of the other Johnson factors. No fees shall be paid for work which was either duplicative or not reasonably related to the litigation.

4. In the circumstances of this case, a reasonable hourly rate for plaintiff's attorneys is not limited to the customary hourly rate for attorneys in the Tallahassee area.

The court then gave the parties 30 days from the date of its order to meet in an attempt to arrive at a stipulation on the amount of attorney's fees owed to plaintiff. If agreement could not be reached within that time, counsel for plaintiff were directed to notify the court, so that a hearing for the purpose of establishing reasonable attorney's fees could be scheduled.

Attempts to negotiate a reasonable fee settlement appear to have foundered, and plaintiff plans to return to the court to request a hearing to establish the actual amount of reasonable attorney's fees to which he is entitled.

LOUISIANA: Gary W. v. Cherry, et al., 437 F. Supp. 1209 (E.D. La. 1976), 429 F. Supp. 711, 441 F. Supp. 1121 (E.D. La. 1977).

On August 8, 1978, plaintiffs filed a motion for appointment of a special master and development of an implementation plan by an expert panel. In this motion, plaintiffs pointed to the slow progress in finding appropriate community placements for class members and the lack of an effective monitoring mechanism to determine "actual," as opposed to "paper," compliance.

MAINE: Wuori v. Zitnay, No. 75-80-SD (S.D. Maine, July 14, 1978).

On July 14, 1978, Federal Judge Edward T. Gignoux signed into law a landmark decree protecting the civil rights of mentally retarded persons in Maine. Attorneys in the case hailed the decree as the first judicial order to establish detailed standards for the care and treatment of persons in community settings, as well as for those still in the institution. The decree recognizes the right of mentally retarded persons released from an institution to the community, to receive "habilitation, including medical treatment, education, training and care, suited to their needs, regardless of age, degree of retardation or handicapping condition."

The decree requires defendants to:

1. Reduce Pineland Center to 350 beds within two years.

2. Establish within one year 130 placements in group homes, foster homes, boarding homes, apartments, sheltered workshops, and day training programs to meet the needs of residents who will be transferred there.

3. Annually establish 124 community placements until all class members who need such placements have received them.

4. Provide that most placements will house less than 15 persons and that no placement shall be developed housing more than 20 persons.

5. Develop an individual plan of care, education and training for each of the more than 500 class members living in the community, as well as for the additional 500 class members living at Pineland Center.

6. Insure that class members living in the community are provided the services of physical therapists, occupational therapists, psychologists, speech therapists, doctors and dentists as needed.

7. Provide respite care services to assist the families of mentally retarded persons.

8. Enforce environment, food and nutrition and staffing standards for residents of community facilities as well as for residents of Pineland Center.

9. Involve mentally retarded persons in activities in the community to the greatest extent possible.

10. Require the adoption of new medication standards designed to protect the residents' right to be free from unnecessary or excessive medication.

In addition to the protections afforded mentally retarded persons already living in the community, the decree also addresses problems of inadequate treatment and insufficient staff at Pineland Center by requiring (a) one aide for every six residents at Pineland Center during waking hours, (b) one professional staff member to work with every three residents, (c) six scheduled hours of program activities each wekday for all residents, (d) adequate and appropriate clothing, and (e) compensation for voluntary labor.

The court has granted plaintiffs' motion for the appointment of a special master to oversee the implementation of the decree. The master, appointed for a two-year term, has been given broad authority to monitor implementation of the decree, to make findings of fact, to

base recommendations on those findings and to resolve disputes between the parties.

MASSACHUSETTS: Brewster v. Dukakis, No. 76-4423-F (D. Mass., filed March 15, 1977).

The first phase of the planning process in this suit has now been completed. The participants in the process -- the plaintiffs, the Department of Mental Health and the Attorney General -- have produced a comprehensive plan for providing community residential and non-residential services in the least restrictive alternative to mentally disabled persons in Western Massachusetts.

These documents and the interim conclusions set forth in the summary have been sent to all the defendants, including the Governor. Defendants are to formulate their response to this plan within 30 days. If their response is acceptable to the plaintiffs and the court, implementation of a community system of less restrictive alternatives will begin immediately. Negotiations will then continue to deal with the problems of and schedule for implementation, as well as procedures to insure quality control in newly developed programs.

MINNESOTA: Welsch v. Dirkswager, 373 F. Supp. 487 (D. Minn. 1974), 550 F.2d 1122 (8th Cir. 1977).

Due to scheduling difficulties, trial in this case will not occur in 1978. Plaintiffs have requested the earliest possible date in 1979, but no definite time has been set.

MISSOURI: Barnes, et al. v. Robb, et al., Civil No. 75 CV87-C (W.D. Mo., Central Division, filed April 11, 1975).

Parties in this case were under a pretrial order which set August 1978 as the target trial date. Although the parties adhered to the trial preparation schedule called for in the pretrial order, the court has not yet set the action on its docket for trial. Plaintiffs have filed a motion to have trial set at the earliest possible date.

MISSOURI: Caswell v. Califano, No. 77-0488 CV-W-4 (W.D. Mo., filed June 30, 1977).

An order of conditional certification of class was entered by Judge Hunter on June 6, 1978, on a stipulation by all parties. The court has yet to rule on the state defendants' motion to dismiss. In the interim, discovery is proceeding.

MONTANA: United States v. Mattson, Civil No. 74138 (D. Mont., Sept. 29, 1976), appeal docketed, No. 76-3568 (9th Cir., Dec. 3, 1976).

Oral argument still has not been scheduled.

NEW JERSEY: In the Matter of C.S., Docket No. HNCC 11-75 (Hunterdon County, M.J., April 18, 1977).

Oral argument was heard on this matter on May 22, 1978, but a decision has not yet been rendered.

WASHINGTON: Washington Association for Retarded Citizens v. Thomas,* No. C-78-163 (E.D. Wash., filed June 16, 1978).

Plaintiffs are residents of five institutions for mentally retarded persons in Washington State. They bring this Pennhurst-type class action alleging that they have suffered years of physical, intellectual and emotional injury, deterioration and deprivation and that this situation is perpetuated because they are segregated in remote and heavily populated institutions and are denied access to appropriate services in the least restrictive setting.

Plaintiffs allege that these practices violate their rights under the first, fourth, fifth, eighth, ninth and fourteenth amendments to the Constitution; the Rehabilitation Act of 1973, 29 U.S.C. §§ 701 et seq.; the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. §§ 6001 et seq.; Titles XIX and XX of the Social Security Act, 42 U.S.C. §§ 1396 et seq. and §§ 1397 et seq.; the Vocational Education Act, 20 U.S.C. §§ 2301 et seq.; and 42 U.S.C. § 1983.

Plaintiffs seek declaratory and injunctive relief.

I. ZONING

VIRGINIA: INSIGHT, Inc., et al.v. City of Manassas, et al., Civil No. 78-255A (E.D. Va., filed April 17, 1978).

Since this case was filed on April 17, 1978, the Manassas City Council has amended the local zoning ordinance to allow group homes for mentally retarded persons to be opened in residential areas of the City pursuant to a special use permit procedure. The INSIGHT group home has secured a special use permit and has established a group home, with five mentally retarded residents, in Manassas. The lawsuit continues, however, to consider the claims of INSIGHT and of the two individual mentally retarded plaintiffs for damages for violation of their rights under the equal protection clause of the Constitution, § 504 of the Rehabilitation Act, and Code of Virginia § 15.1-486.2, and for a declaration that the present requirement of a special use permit violates the pre-emptive Virginia statute.

A pretrial conference in this case was held on August 17, 1978, and trial is scheduled for September 7, 1978.

II. CASES WITH NO KNOWN NEW DEVELOPMENTS AND CLOSED CASES REPORTED IN EARLIER ISSUES OF "MENTAL RETARDATION AND THE LAW"

A. ARCHITECTURAL BARRIERS

Alabama: Snowdon v. Birmingham-Jefferson County Transit Authority, No. 75-G-33-S (N.D. Ala., June 24, 1975).

District of Columbia: Washington Urban League, Inc. v. Washington Metropolitan Area Transit Authority, Civil No. 776-72 (D.D.C. 1976).

Maryland: Disabled in Action of Baltimore v. Hughes, Civil Action No. 74-1069-HM (D. Md.)

Ohio: Friedman v. County of Cuyahoga, Case No. 895961 (Court of Common Pleas, Cuyahoga County, Ohio), consent decree entered November 15, 1972.

B. CLASSIFICATION

Illinois: State of Illinois v. Donald Lang, No. 76 Crim. 064 (Cir. Ct., Cook Cty., October 11, 1977).

Louisiana: Lebanks, et al. v. Spears, et al., consent decree, 60 F.R.D. 135 (E.D. La. 1973).

Massachusetts: Stewart, et al. v. Philips, et al., Civil Action No. 70-1199-F (D. Mass., filed Sept. 14, 1970).

C. CONFIDENTIALITY/ACCESS TO RECORDS

Illinois: Beavers v. Sielaff, No. 71 C 417 (N.D. Ill., May 12, 1977).

D. COMMITMENT

District of Columbia: United States v. Shorter (Superior Ct., D.C., Nov. 13, 1974). No. 9076 (D.C. Ct. of Appeals, August 26, 1975).

Illinois: In re Whitehouse, No. 76-220 (Ill. App. Ct., Dec. 23, 1977).

Indiana: Jackson v. Indiana, 406 U.S. 715 (1972).

Michigan: White v. Director, Michigan Department of Mental Health, No. 75-10022 (E.D. Mich., filed Aug. 6, 1975).

Pennsylvania: Mersel v. Kremens, No. 75-159 (E.D. Pal, Aug. 20, 1975).

Vermont: Frederick v. Yancer, Civil No. 76-257 (D. Vt., March 17, 1978).

West Virginia: State ex rel. Miller v. Jenkins, No. 13340 (Supreme Ct. of Appeals, W. Va. at Charleston, March 19, 1974).

Wisconsin: State ex rel. Matalik v. Schubert, 47 Wis. 2d 315, 204 N.W.2d 13 (Supreme Ct., Wis. 1973).

Wisconsin: State ex rel. Haskins v. County Court of Dodge County, 62 Wis. 2d 250, 214 N.W.2d 575 (Supreme Ct., Wis. 1974).

E. CRIMINAL LAW

District of Columbia: United States v. Masthers, 539 F.2d 721 (D.C. Cir. 1976).

Georgie: Pate, et al. v. Parham, et al., Civil No. 75-46 Mac. (M.D. Ga., Sept. 19, 1975).

Louisiana: Louisiana v. Bennett, No. 58,536 (La. Sup. Ct., filed April 4, 1977).

F. CUSTODY

Georgia: Lewis v. Davis, Civil Action No. D-26437 (Superior Ct., Chatham Cty., Ga., July 19, 1974).

Iowa: In the Interest of Joyce McDonald, Melissa McDonald, Children, and the State of Iowa v. David McDonald and Diane McDonald, Civil No. 128/55162 (Iowa Supreme Ct., October 18, 1972).

Iowa: In the Interest of George Franklin Aisager, et al. and the State of Iowa v. Mr. and Mrs. Aisager, Civil No. 169/55148 (Iowa Supreme Ct., October 18, 1972).

G. EDUCATION

California: California Association for Retarded Children v. State Board of Education, No. 237277 (Superior Ct., Sacramento Cty., filed July 27, 1973).

California: California Association for Retarded Citizens v. Riles, No. C77-0341 (N.D. Cal., filed Feb. 15, 1977).

California: Case, et al. v. State of California, Civil No. 101679 (Superior Ct., Riverside Cty.)

California: Crowder v. Riles, No. CA 000384 (Super. Ct., Los Angeles Cty., Dec. 20, 1976).

Colorado: Colorado Association for Retarded Children v. State of Colorado, Civil No. C4620 (D. Colo.).

Connecticut: Kivell v. Nemoitan, No. 143913 (Superior Ct., Fairfield Cty., Conn., July 18, 1972).

Delaware: Beauchamp v. Jones, No. 75-350 (D. Del. 1975).

District of Columbia: Mills v. Board of Education, 348 F. Supp. 866 (D.D.C. 1972). Supplemental Orders on Contempt and Master, March and July 1975.

Florida: Florida Association for Retarded Children v. State Board of Education, Civil No. 730250-CIV-NCR (S.D. Fla).

Florida: Florida ex rel. Stein v. Keller, No. 73-28747 (Cir. Ct., Dade Cty., Fla.).

Florida: Florida ex rel. Grace v. Dade County Board of Public Instruction, No. 73-2874 (Cir. Ct. Dade Cty., Fla.).

Georgia: David v. Wynne, Civil No. LU-176-44 (S.D. Ga. 1976).

Illinois: C.S., et al. v. Deerfield Public School Dist. #109, Civil No. 73 1 284 (Cir. Ct., 19th Jud. Cir., Lake Cty, Ill.).

Illinois: W.E., et al. v. Board of Education of City of Chicago, Civil No. 73 CH 6104 (Cir. Ct., Cook Cty., Ill.).

Indiana: Dembowski v. Knox Community School Corporation, Civil No. 74-210 (Starke Cty. Ct., Ind., filed May 15, 1974).

Indiana: Sonnenburg v. Bowen, No. 74 P.S.C. 1949 (Porter Cty. Cir. Ct., Ind., filed October 9, 1974).

Kentucky: Kentucky Association for Retarded Children v. Kentucky, No. 435 (E.D. Ky.), consent decree, Nov. 1974.

Maryland: Maryland Association for Retarded Children v. Maryland, Civil No. 720733-K (D. Md.). In the Maryland State Court, Equity No. 77676 (Cir. Ct., Baltimore Cty., April 9, 1974).

Massachusetts: Allen v. McDonough, Civil No. 14948 (Superior Ct., Mass., Sept. 28, 1977 and April 1978).

Michigan: Harrison v. State of Michigan Civil No. 38557 (E.D. Mich.).

New Hampshire: Swain v. Barrington School Board, No. Eq. 5750 (Superior Ct., N.H., March 12, 1976).

New York: In re Tracy Ann Cox, Civil No. H4721-75 (N.Y. Fam. Ct., Queens Cty., April 8, 1976).

New York: In re Richard G (N.Y. Sup. Ct., App. Div., 2d Dept., May 17, 1976).

New York: Reid v. Board of Education of the City of New York, No. 8742 (Commission of Education for the Sate of New York, Nov. 26, 1973). Federal Court Abstention Order, 453 F.2d 238 (2d Cir. 1971).

North Carolina: Hamilton v. Riddle, Civil No. 72-86 (Charlotte Div., W.D.N.C.).

North Dakota: In re G.H., Civil No. 8930 (Supreme Ct., N.D., April 30, 1974).

North Dakota: North Dakota Association for Retarded Children v. Peterson (D.N.D., filed November 1972).

Ohio: Cuyahoga County Association for Retarded Children and Adults v. Essex, No. C 74-587 (N.D. Ohio, April 5, 1976).

Pennsylvania: Fialkowski v. Shapp, 405 F. Supp. 946 (E.D. Pa. 1975).

Pennsylvania: Pennsylvania Association for Retarded Children v. Pennsylvania, 344 F. Supp. 1275 (E.D. Pa. 1971).

Rhode Island: Rhode Island Society for Autistic Children v. Board of Regents, Civil No. 5081 (D.R.I.), stipulations signed September 19, 1975.

Washington: Rockafellow v. Brouillet, No. 787938 (Superior Ct., King Ct., King Cty., Wash.).

West Virginia: Doe v. Jones (Hearings before the State Superintendent of Schools, January 4, 1974).

Wisconsin: Marlega v. Board of School Directors of City of Milwaukee, Civil No. 70C8 (E.D. Wis.), consent decree, September 1970.

Wisconsin: State of Wisconsin ex rel. Warren v. Nusbaum, 219 N.W.2d 577 (Supreme Ct., Wis. 1974).

Wisconsin: Unifed School District No 1 v. Barbara Thompson, Case No. 146488 (Cir. Ct., Dane Cty.), memorandum decision, May 21, 1976.

H. EMPLOYMENT

District of Columbia: National League of Cities v. Usery, 426 U.S. 833 (1976).

District of Columbia: Souder v. Brennan 367 F. Supp. 808 (D. D.C. 1973).

Florida: Roebuck v. Florida Department of Health and Rehabilitation Services, 502 F.2d 1105 (5th Cir. 1974).

Indiana: Sonnenberg v. Bowen, Civil No. P.S.C. 1949 (Porter Cty. Cir. Ct., Ind., filed October 9, 1974).

Iowa: Brennan v. State of Iowa, 494 F.2d 100 (8th Cir. 1973).

Maine: Jortberg v. Maine Department of Mental Health, Civil No. 13-113 (D. Me.), consent decree, June 18, 1974.

Massachusetts: Smith and Doe v. United States Postal Service, Civil No. 76-2452-S (D. Mass., filed June 21, 1976).

Missouri: Employees of Department of Public Health and Welfare, State of Missouri v. Department of Public Health and Welfare, State of Missouri, 411 U.S. 279 (1973).

Montana: Littlefield v. State of Montana, Civil No. 38794 (1st Jud. Dist., Mont., Oct. 1, 1976).

New Jersey: Schindenwolf v. Klein, Civil No. L-41293-75 PW Superior Ct., N.J., filed June 23, 1976).

Ohio: Souder v. Donahey, No. 75222 (Supreme Ct., Ohio).

Ohio: Walker v. Gallipolis State Institute, Case No. 75CU-90-3676 (Court of Common Pleas, Franklin Cty., Ohio), dismissed September 8, 1976.

Tennessee: Townsend v. Treadway, Civil No. 6500 (M.D. Tenn., Sept. 21, 1973).

Wisconsin: Weidenfeller v. Kidulis, 380 F. Supp. 445 (E.D. Wis. 1975).

I. GUARDIANSHIP

Connecticut: Albrecht v. Tepper, Civil No. H-263 (D. Conn., Feb. 10, 1977).

Connecticut: McAuliffe v. Carlson, 377 F. Supp. 869 (D. Conn. 1974), supplemental decision, 386 F. Supp. 1245 (D. Conn. 1975).

Illinois: Rud v. Dahl, No. 77 C 2361 (D. Ill, Sept. 7, 1977).

Michigan: Michigan Associationfor Retarded Citizens v. Wayne County Probate Judge, Civil No. 77-533 (Mich. Ct. App. Nov. 9, 1977).

Michigan: Schultz v. Borradaile, Civil No. 74-40123 (E.D. Mich., filed Oct. 25, 1974).

Michigan: Todd and Baldridge v. Smith, No. 75-10024 (E.D. Mich., Jan. 21, 1977).

Pennsylvania: Vecchione v. Wohlgemuth, 377 F. Supp. 1361 (E.D. Pa. 1974), 426 F. Supp. 1297 (E.D. Pa. 1976), 558 F.2d 150 (3d Cir. 1977), additional order, Feb. 10, 1978.

J. LIMITATION ON TREATMENT

Massachusetts: Superintendent of Belchertown State School v. Saikewicz, No. 711 (Mass. Sup. Jud. Ct., Nov. 28 1977).

K. PROTECTION FROM HARM

New York: Rodriguez v. State, 355 N.Y.S.2d 912 (Ct. of Claims 1974).

Pennsylvania: Janet D. v. Carros, No. 1079-73 (Court of Common Pleas, Allegheny Cty., Pa., March 29, 1974).

L. STERILIZATION

Alabama: Wyatt v. Aderholt, 368 F. Supp. 1382 (M.D. Ala. 1972).

California: In re Kemp, 43 Cal. App. 3d 758 (Ct. of Appeals 1974).

Illinois: Stump v. Sparkman, 552 F.2d 172 (7th Cir. 1977), ___ U.S. ___ (March 28, 1978).

Missouri: In re M.K.R., 515 S.W.2d 467 (Supreme Ct., Mo. 1974).

North Carolina: Cox v. Stanton, Civil No. 800 (E.D.N.C., filed January 8, 1974).

North Carolina: In re Moore, 221 S.E.2d 307 (Supreme Ct., N.C. 1976).

North Carolina: Trent v. Wright (E.D.N.C., filed Jan. 18, 1974).

Tennessee: In re Lambert, Civil No. 61156 (Tenn. Prob. Ct., Davidson Cty., March 1, 1976).

Wisconsin: In re Mary Louise Anderson (Dane Cty. Ct., Branch I, Wis., Nov. 1974).

M. TREATMENT

Alabama: Pugh v. Locke and James v. Wallace, 406 F. Supp. 318 (M.D. Ala. 1976).

District of Columbia: Dixon v. Califano, 405 F. Supp. 794 (D.D.C. 1975).

California: Revels v. Brian, No. 658 044 (Superior Ct., San Francisco, Cal.)

Georgia: Burnham v. Department of Health of the State of Georgia, 349 F. Supp. 1335 (N.D. Ga. 1972), 503 F.2d 1319 (5th Cir. 1974), cert. denied, 43 U.S.L.W. 3682 (1975).

Hawaii: Gross v. Hawaii, Civil No. 43090 (Cir. Ct., Hawaii), consent decree, February 3, 1976.

Illinois: Nathan v. Levitt, No. 74 CH 4080 (Cir. Ct., Cook Cty., Ill.), consent order, March 26, 1975.

Illinois: Rivera v. Weaver, Civil No. 72C135.

Illinois: Wheeler v. Glass, 473 F.2d 983 (7th Cir. 1973).

Kentucky: Kentucky Association for Retarded Citizens v. Conn, Civil No. C-77-0048 (W.D. Ky., filed May 16, 1977).

Kentucky: Kentucky Association for Retarded Citizens v. Kentucky Health Systems Agency West, No. C 77-0511 L(A) (W. D. Ky., Oct. 18, 1977).

Maryland: Bauer v. Mandel, No. 22-871 (Anne Arundel Cir. Ct., filed Sept. 1975).

Massachusetts: Gauthier v. Benson, Civil No. 75-3910-T (D. Mass.).

Massachusetts: Ricci v. Greenblatt, Civil No. 72-469F (D. Mass.), consent decree, Nov. 12, 1973.

Michigan: Jobes v. Michigan Depatment of Mental Health, Civil No. 74-004-130 DC (Cir. Ct., Wayne Cty., Mich.).

Mississippi: Doe v. Hudspeth, Civil No. J 75-36 (N) (S.D. Miss., filed Feb. 11, 1975).

Nebraska: Horacek and United States v. Exon, 357 F. Supp. 71 (D. Neb. 1973), consent decree, Oct. 31, 1975, amended consent decree, Feb. 10, 1978.

New Jersey: In re C.S., Docket No. NHCC 11-75 (Hunterdon Cty., N.J., April 18, 1977).

Ohio: Barbara C. v. Moritz, Civil No. C 2-77-887 (S.D. Ohio, filed Nov. 17, 1977).

Ohio: Davis v. Watkins, 384 F. Supp. 1196 (N.D. Ohio 1975).

Ohio: Ohio Association for Retarded Citizens v. Moritz, No. C2-76-398 (S.D. Ohio, April 19, 1977).

Pennsylvania: Roe v. Pennsylvania, No. 74-519 (W. D. Pa., filed June 9, 1976).

Pennsylvania: Waller v. Catholic Social Services, No. 74-1766 (E.D. Pa.).

Tennessee: Saville v. Treadway, Civil No. Nashville 6969 (M.D. Tenn., March 8, 1974), consent decree, Sept. 18, 1974.

Washington: Boulton v. Morris, No. 781549 (Superior Ct., King Cty., Wash., filed June 1974).

Washington: Preston v. Morris, Civil No. 77-9700 (Superior Ct., King Cty., Wash., filed April 23, 1974).

Washington: Washington v. White and Morris, No. 4350-1 (Ct. of Appeals, Wash., January 31, 1977).

N. VOTING

Massachusetts: Boyd v. Board of Registrars of Voters of Belchertown, No. 75-141 (Sup. Jud. Ct., Mass., Sept. 30, 1975).

New Jersey: Carroll v. Cobb, No. A-669-74 and A-1044-74 (Superior Ct., N.J., Appellate Div., Feb. 23, 1976).

O. ZONING

California: Defoe v. San Francisco Planning Commission, Civil No. 30789 (Superior Ct., Cal.).

California: Los Angeles v. California Department of Health, 2d Civil No. 48697 (Ct. of Appeals, Cal. 2d App. Dist., Nov. 2, 1976).

Colorado: City of Delta v. Thompson v. Nave and Redwood, No. 75-431 (Ct. of Appeals, Colo., Dec. 11, 1975).

Florida: City of Temple Terrace v. Hillsborough Association for Retarded Citizens, 44 U.S.L.W. 2189 (Fla. Ct. App. 2d Dist., Oct. 10, 1975).

Massachusetts: Zarek v. Attleboro Area Human Services, Civil No. 2540 (Superior Ct., Mass.).

Michigan: Doe v. Damm, Complaint No. 627 (E.D. Mich.)

Michigan: Michigan Association for Retarded Children v. Village of Romeo, Civil No. 670769 (E.D. Mich.), federal abstention order, August 2, 1976. No. 76-6267-C2 (Mich. Cir. Ct., Macomb Cty., March 1, 1977).

Minnesota: Anderson v. City of Shoreview, No. 401575 (D. Ct., 2d Jud. Dist., Minn., June 24, 1975).

Montana: State ex rel. Thelan v. City of Missoula, No. 13192 (Supreme Ct., Mont., Dec. 8, 1975).

New York: Little Neck Community Association v. Working Association for Retarded Children (N.Y. Sup. Ct., App. Div., 2d Dept., May 3, 1976).

New York: Village of Belle Terre v. Borass, 91 S. Ct. 1536 (1974).

Ohio: Boyd v. Gateways to Better Living, No. 73-CI-531 (Mahoning Cty. Ct. of Common Pleas).

Ohio: Driscoll v. Goldberg, No. 72-CI-1258 (Mahoning Cty. Ct. of Common Pleas, Ohio), 73 C.A. 49 (Ohio Ct. of Appeals, 7th Dist., April 9, 1974).

Ohio: Village of Walbridge v. State of Ohio, No. 78-CIV-37 (Common Pleas Ct., Wood Cty., Ohio, filed Feb. 22, 1978).

Wisconsin: Browndale International, Ltd. v. Board of Adjustment, 60 Wis. 2d 183, 208 N.E.2d 121 (Wis. 1973), cert. denied, 94 S. Ct. 1933 (1974).

III FEATURE ARTICLE

THE RETARDED OFFENDER AND CORRECTIONS

Miles B. Santamour & Bernadette West

At least three times as many retarded people are found in prisons in the United States than among the general U.S. population.

In a 1969 national survey of prisons and correctional facilities, Doctors Bertram Brown and Thomas Courtless found that, while retarded persons make up only about three percent of the general population, nearly ten percent of all incarcerated individuals were mentally retarded, with I.Q.s below seventy. These findings have been verified by more recent studies which indicate that in 1976 there were an astounding 23,700 retarded persons in prisons across the nation.

The high percentage of retarded inmates does not, by any means, indicate that retarded persons are more prone to criminal behavior than are non-retarded persons. Misunderstandings about the nature of retardation have created a situation in which many people believe criminality and retardation to be related in some way; or that retardation causes criminal behavior. But the condition of retardation and the behavior we call criminal are not synonymous and must not be confused. Retardation is a condition occurring before birth or during an individual's developmental years which affects his learning and maturation processes. Criminal behavior, on the other hand, is the perpetration of an act adjudicated to be illegal.

If retardation and criminality are not synonymous, or if there is no clear cause-and-effect relationship between the two, how can the proponderance of incarcerated mentally retarded persons be explained? This paper will maintain that the answer is that mentally retarded persons are at a distinct disadvantage in the criminal justice system. They are effectively discriminated against intentionally or unintentionally, both in court proceedings and in correctional facilities. Largely due to failures of the present criminal justice system -- failures caused by a lack of understanding of retardation -- a mentally retarded person is (1) more likely to be convicted, (2) less likely

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Miles Santamour and Bernadette recently conducted an extensive national survey of prisons and a comprehensive review of the research and literature in preparation of writing a prescriptive package for Law Enforcement Assistance Administration on retarded offenders which was part of an American Correctional Association's special offender project. This paper is a digest of that effort. Two books entitled "The Mentally Retarded Offender and Corrections" and "Retardation, Corrections and the Retarded Offender - An Annotated Bibliography" were published; the first by the National Institute of Law and Criminal Justice and the latter by the Presidents' Committee on Mental Retardation.

to receive probation or parole, and (3) more likely to recidivate than is his non-retarded counterpart.

Mental Illness and Retardation:

The general confusion from a lack of comprehensive knowledge about mental retardation on the part of professionals is further compounded by the myriad of legal definitions of mental retardation which vary from jurisdiction to jurisdiction. Very often laws make no distinction between mental illness and mental retardation, and very often the solution employed in handling the retarded individual is to place him in a mental hospital. Under certain defective delinquency laws the mentally retarded are categorized with the sociopath, and certain sexual offenders. Mental illness and mental retardation are two different conditions.

Competency:

Very much related to the confusion between mental illness and mental retardation is the issue of competency. Competency can be defined generally as the ability to cooperate with one's attorney in one's own defense and the awareness and understanding of the consequences of those proceedings. In cases where the issue has been raised, a judgment must be made in order to determine whether the accused person should stand trial at the time, or whether a delay is in order until the person is restored to competency.

In the case of retardation, restoration to competency should not be the issue. This is very different from the issue of competency in relation to mental illness where it is presumed the individual's "illness" influences his competency and restoration is possible. The question the courts should weigh is the person's level of competency and his potential for becoming more competent. "Rehabilitation" or treatment for the mentally retarded offender should be directed toward raising his level of competency or providing a mentor or compassionate guide to compensate for his deficiencies.

In many cases mental illness is transitory often with a reduction of symptoms leading to recovery. But for the mentally retarded person the deferment of trial for reasons of incompetency has very often resulted in lifetime commitment to an institution since it is not likely that the individual will be cured of retardation. (Wald)

In many ways the use of incompetency to stand trial has been detrimental to retarded people. As the President's Committee on Mental Retardation (1974) points out:

> The mentally retarded person is in a uniquely damned position before the courts. If his disability remains undetected, his chance of receiving proper court handling is reduced. But if his impairment is recognized, he may receive a long term institutional commitment without a trial for the alleged offense.

In recent years, individuals have become aware of the abuses involved with the use of the competency issue. The court recently considered the matter in the case of Jackson v. Indiana, where the individual maintained that confinement under certain conditions deprived him of his rights. In the report on the status of current court cases, the President's Committee on Mental Retardation (1975) reports that the Supreme Court held, inter alia:

> ...that a person charged by a State with a criminal offense who is committed solely on account of his incapacity to proceed to trial cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the forseeable future, If it is determined that this is not the case, then the State must either institute the customary civil commitment proceeding that would be required to commit indefinitely any other citizen or release the defendant.

It is important to observe that the usual discussion of competency has dealt with the problem as if it were a black and white issue -- either an individual is or is not competent. The President's Committee on Mental Retardation goes further to suggest that the courts should recognize gradations or degrees of competency.

Convictions:

Mentally retarded persons function at a lower intellectual level than do "normal" persons. They also lag behind in what is called "adaptive behavior," or the ability to deal effectively with one's environment. They learn both academic subjects and life skills more slowly than do normal persons, and in some extreme cases they may fail to learn such things at all. These two factors of limited intellectual functioning and lagging adaptive behavior make the retarded person an outcase in society. To be accepted for who he is, with all his shortcomings, special needs, and potential, is an all-too-infrequent occurrence in the life of a retarded person. The desire for and the need for acceptance is universal; the retarded person seeks acceptance just as we all do. Consequently, a retarded person will sometimes go to great lengths to please some individual who treats

him with kindness or is attentive in some way. But, tragically, it is this reaching out for acceptance, coupled with his lower intelligence, that may very well place the retarded person at a disadvantage when he is accused of breaking the law.

The fact that retarded inmates are anxious to be accepted and therefore easily persuaded, is verified to all junctures at which the retarded person encounters the criminal justice system. Indeed, Giagiari determined that retarded suspects confess, react to friendly suggestions and to intimidations, and plead guilty more readily and more frequently than do their non-retarded counterparts. This fact sheds a very revealing light on the following statistics regarding court cases involving retarded defendants: (Brown and Courtless:)

- In 59% of all cases studied, the mentally retarded person entered a plea of guilty.
- In 40% of those cases where a guilty plea was not entered, the retarded individual waived his right to trial by jury.
- The arresting charge was the same as the convicting charge in 80% of the cases, meaning that only 20% of the retarded individuals plea-bargained or were otherwise granted a reduced charge.
- Confessions or incriminating statements were obtained from fully two-thirds of the retarded defendants.
- In 88% of the cases, the verdict was not appealed.
- No post-conviction relief was requested in 84% of the cases.

The failure of judges and lawyers to recognize retardation, and their lack of understanding of the needs of retarded persons may be blamed for the fact that retarded individuals are taken advantage of in the area of adjudication.

Probation and Parole:

After his conviction, the retarded offender's disadvantage is continued, if not magnified. He is less likely than others to be granted probation, since it is more commonly given to persons with greater intelligence and higher educational achievement. Work history is another important consideration in the granting of probation, and since the mentally retarded person is usually underskilled and undereducated, his work history is not likely to portray him as a strong candidate for probation (Hopkins and Friel).

Denied probation, the retarded offender is most often placed in a prison. There, it appears, his lag in development contributes to his inability to complete those programs that are sometimes required for parole. In addition, his slow adaptation to prison routine and his difficulty in understanding what is expected of him frequently

result in rule infractions which make him an even less likely candidate for parole. This reduced eligibility for parole is undoubtedly a major explanation to the fact that the mentally retarded offender remains in prison an average of two to three years longer than his "normal" counterpart.

Recidivism:

The rate of recidivism is much higher for mentally retarded than for normal offenders. A fact mentioned above, that retarded persons frequently cannot complete programs required for parole, gives a clue as to the reason for these higher recidivism rates. The explanation is very simply, that programs for retarded offenders are either entirely lacking or markedly ill-suited to their special needs.

The study by myself and West revealed that none of all correctional facilities surveyed had appropriate programs for retarded inmates. A partial explanation for this lack is the fact that some prison personnel do not believe that their facilities should have responsibility for retarded offenders. Mental Retardation facilities, they argue, would be better equipped to deal with mentally retarded offenders. It cannot be denied that the presence of mentally retarded persons creates problems in prisons. They are often exploited by their more intelligent peers, becoming the brunts of practical jokes and the victims of rapes. Fearful of exposing himself to ridicule, the retarded inmate is likely to either play the clown or become hostile when confronted with situations which challenge his intellect. Furthermore, the kind of program he needs, as we shall see later, requires the outlay of additional prison funds and the hiring of additional personnel. While treating the retarded offender within correctional facilities is, then, fraught with difficulties, treating him in facilities for non-criminal retarded persons creates an even less desirable situation.

Mentally retarded offenders generally function at a somewhat higher intellectual level than do their mentally retarded, non-offending peers. They tend, furthermore, to be more sophisticated or streetwise, are better able to mask their limitations, and are inflicted with fewer physical handicaps than are their non-criminal peers. Exploited by normal offenders if placed in prison, when housed with non-criminal retarded persons, the retarded offender turns the tables and himself becomes the aggressor and exploiter. Administrators of retardation facilities rightly argue that they cannot be expected to provide the kinds of secure facilities required for offenders, and that to subject average retarded persons to harm at the hands of offenders is wholly unjust.

It seems, then, that it is the lesser of two evils to house retarded offenders in correctional facilities. But, even where this has been acknowledged, adequate rehabilitative programs for the retarded do not exist. Indeed, it could be argued that any "rehabilitative" program would be inadequate for the retarded offender. For what he requires, most often, is not rehabilitation but, simply, habilitation.

What will be argued here is that prison programs for the retarded must deal with the condition of retardation as much, as, if not more than, with the problem of criminal behavior. For, while a retarded person is not more prone to criminal behavior than a normal person, he may be said to be either more or less prone than others to certain causes of criminal behavior.

The major factors involved in most illegal behavior may be divided into five general classifications: (1) a misunderstanding of how to use institutions in society to attain desired goals in a legally sanctioned fashion, (2) a striking out against society in frustration stemming from one's own limitations or feelings of rejection, (3) mental illness causing irrational behavior, (4) socio-pathology or criminal behavior based upon a calculated disregard for other people's rights, and (5) naivete or an inability to foresee or appreciate the consequences of one's own behavior. Factors (1) misunderstanding how to use social institutions, (2) striking out in frustration, and (5) naivete, can each be directly related to the condition or retardation, and are generally easier to deal with than are mental illness and socio-pathic behavior.

Owing both to the factors involved in a retarded person's criminality, and to his aforementioned anxiousness to please, the retarded offender has an excellent chance to adjust his behavior when offered programs designed to meet his special needs. But investigations have indicated that even those programs that do exist have proven to be little more than special education classes of a public school nature, geared more toward individuals of "borderline" intelligence (I.Q.'s of 70 to 90), who comprise another fifteen to twenty percent of the inmate population, than toward retarded persons (I.Q.'s below 70). There are no programs of a habilitative, developmental nature.

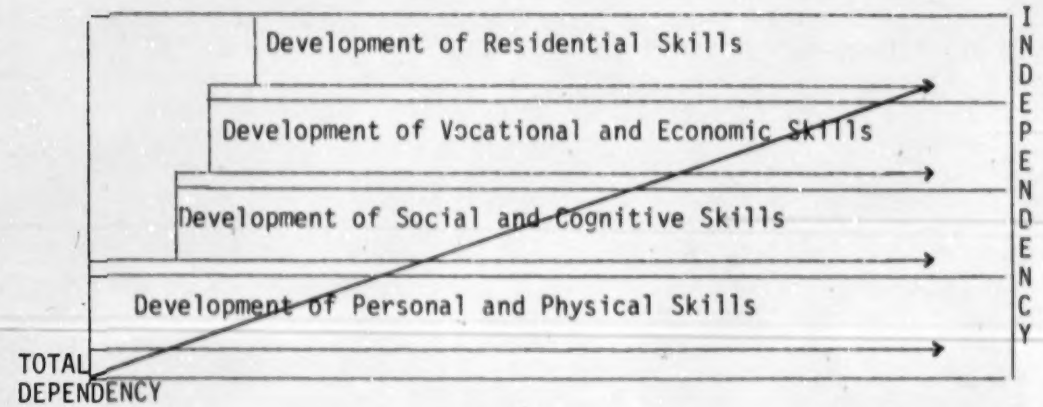
The Nature of Retardation

At this point the concepts of development and habilitation must be expanded. A mentally retarded person's development lags behind that of a normal person's. It is slower. It is retarded. A retarded individual matures and learns more slowly than others. But he does mature. Contrary to the understanding of the general public, retardation does not arrest development at any one stage. While the retarded person will never reach a "normal" level of intellect and development, growth always remains a possibility. Well-designed programs have had very positive impacts on mentally retarded persons, and

phenomenal improvements in their abilities have been recorded. Therefore, programs for retarded inmates are clearly appropriate and, one might argue, morally mandated.

To develop appropriate programs for retarded prisoners, correctional personnel must understand why retardation is problematic to the individual and to society in general. The retarded person's lag in development leads to a prolonged dependency on others. Retardation may most constructively be viewed as a problem of dependency which has four facets: physical, social, economic, and residential. (Santamour and Ross)

MOVEMENT TOWARDS INDEPENDENCE IN THE DEVELOPMENTAL PROCESS


Development of Residential Skills
Development of Vocational and Economic Skills
Development of Social and Cognitive Skills
Development of Personal and Physical Skills
TOTAL DEPENDENCY
INDEPENDENCY

The development of independence involves, in retarded and normal persons alike, the mastery of skills and abilities that build upon one another: for example, one cannot run until one can walk. The first step toward independence involves the mastery of basic physical skills, such as walking, eating, and toileting. The second step, which cannot be taken until the first step has been satisfactorily mastered, involved the development of the individual's social abilities and cognitive skills. Once these skills have been sufficiently mastered, an individual can begin to learn and to practice the saleable skills that are necessary for him to support himself.

The model above represents development and movement in two directions, illustrated by both vertical and horizontal expansion. As the individual develops one category of skills throughout his lifetime (movement along the horizontal plane), he also moves toward new skills and abilities (movement along the vertical plane). It is this lifelong, continuous process of expanding existing abilities and developing new ones that moves an individual toward ever greater independence.

Though this process is the same for retarded and normal persons, a retarded individual requires more time to develop proficiencies than do normal persons, and may also require special aids to compensate for his disabilities. Most programs in corrections fail the retarded offender because they attempt to develop skills related to job sucess without first developing more basic skills. Habilitation requires taking the person through the entire developmental process.

Developing Programs for Retarded Offenders:

The recommended procedures and programs outlined below will, it is hoped, provide a practical approach to the treatment of retarded offenders within correctional settings. While they are specifically designed for those who score less than seventy on any standardized I.Q. test, the programs would also be appropriate, in modified form, for the offender with borderline intelligence. Because of the differences in their degree of sophistication, however, and owing to the abuse characteristic of the "pecking order" in prison culture, "borderline" individuals should only rarely be grouped with retarded offenders.

The system proposed here includes: diagnosis; evaluation and classification; development of personal, physical, educational, and vocational skills; courses in human sexuality; and the development of social values and independent life skills. The ultimate goal is the re-entry of the retarded offender into the community as an independent, law-abiding, and better adjusted individual. The basic assumption underlying this goal is that a retarded person has the right to equal opportunities for developing to his fullest potential.

It is extremely important that the retarded offender be identified early in the criminal justice system and that each person's individual needs be carefully and completely assessed. Therefore, testing is essential, and should include an initial diagnosis, a classification, and a full evaluation of each individual.

Diagnosis: Group tests may be administered to all inmates in order screen out those who may be retarded. Examples of appropriate group tests are: the Revised Beta Examination, the Army General Classification Test, the Academic Promise Test, the California Test of Mental Maturity (short or long form), and the Lorge Thorndike Intelligence Tests. Any individual who scores below eighty on any of the above tests should then be subjected to an individual standardized test, such as the Stanford Binet tests or the Wecshler Adult Intellegence Scale (WAIS).

Classification: Following diagnosis, those individuals identified as retarded should be classified in terms of their mental health and security needs. A retarded offender whose behavior is non-aggressive is in no way helped by being subjected to the rigors of maximum or medium security where he must learn a complicated system of rules and behaviors before moving to a less restrictive setting. Likewise, since some retarded offenders are violent, secure settings must also be available. The following three classifications of retarded offenders should suffice:

Group A: Retarded offenders convicted of violent crimes and whose behavior is dangerously aggressive and anti-authoritarian. Members of this group should be assigned to a medium security setting and allowed to progressively work their way toward less secure settings. The primary emphasis in the early stages of incarceration should be on the modification of behavior, along with participation in developmental and counselling services (discussed below). Ideally, this group should be separated from the general inmate population, and the setting should be made as personal as possible. When housed in small groups, it should be possible to somewhat relax security codes even for this group, in light of their general lack of inventiveness and organizational abilities.

Group B: Retarded offenders who have been convicted of non-violent crimes and whose behavior is not dangerously aggressive. Members of this group should be placed in a minimum security setting apart from the general prison population, or in a closely supervised group setting within the open community.

Group C: Retarded offenders whose behavior is considered to be a manifestation of mental illness or a behavioral disorder. The behavior of these offenders may be bizarre or characterized by extreme withdrawal, outbursts of uncontrolled temper, extreme aggressiveness towards themselves or others, or a preoccupation with imaginary voices. These persons require, at least initially, the special services of a psychiatric unit.

It must be remembered in dealing with all three groups that retarded offenders are less likely than others to appreciate the consequences of escape and have a tendency to run away from frightening or unfamiliar situations. Consequently, close supervision is called for, especially during the earlier stages of incarceration.

Evaluation: Following classification into Groups A, B, or C, the social maturity and functional skills of the retarded offender must be evaluated in order for him to be placed in an individual or group program suited to his needs. The following standardized tests and interviews may be useful: The Adaptive Behavior Scale, the Vineland Social Maturity Scale, the Progress Assessment Chart (PAC), the Adult

Basic Education Test, and the Rosenzweig Picture-Frustration Study. Tests should also be administered to determine each individual's vocational interests, abilities, limitations, and potentials. In particular, each person's dexterity, sorting and other discrimination skills, physical tolerance for work, and perceptual and/or motor abilities must be tested. The following tests are recommended: the Purdue Pegboard Test, Crawford's Small Parts Dexterity Test, the O'Connor Finger Dexterity Test, the Benet Hand Tool Dexterity Test, the Minnesota Rate of Manipulation Test, the Stromberg Dexterity Test, the Wells Concrete Directions Test, and the Purdue Perceptual Motor Abilities Survey. These vocational tests must be used in combination, since no one test can adequately measure all critical factors. They should also be used in conjunction with an evaluative interview with the offender. The use of work samples drawn from actual sub-contractual work to further determine interests and potentials, is also strongly recommended. All evaluative tests should be supplemented by clinical judgment and bio-medical testing, since many retarded persons suffer from epilepsy and other physical disabilities that will affect their programming.

Daily Living Program: A very important component of the program itself is that sector we will call the Activities of Daily Living Program. The focus of this program is to provide the retarded individual with the basic skills necessary to independent living. The curriculum should include both classroom and practical experience, and should cover the following subjects (sequence may vary): (1) Grooming and Personal Hygiene, (2) Laundering, (3) Menu Planning and Food Preparation, (4) Housekeeping, (5) Budget Preparation and Money Management, (6) Human Sexuality, Marriage, and Family Planning, (7) Drug and Alcohol Use and Abuse, (8) Current Events, (9) Civil and Legal Rights, (10) Available Community Services (including food co-ops, legal-aid agencies, public assistance and food stamps, free medical and dental clinics and health departments, emergency hospital rooms, Goodwill Industries and their thrift shops, etc.), and (11) Leisure Time Activities.

The staff administering such a program should always be mindful of the differing levels of abilities and skills among retarded persons. They must not assume that each individual requires the same program with the same degree of emphasis. While some retarded inmates may, for example, need extensive assistance in improving their personal grooming habits, it would not be unusual for others to have developed these skills to a degree superior to that achieved by most normal persons. To subject the latter group of inmates to an extensive program on grooming would therefore be both humiliating and counter-productive.

Staff should also remember that instructions to retarded persons must always be given verbally, in careful detail, and repeatedly. They should also recognize that one of the basic problems confronted by retarded persons is their total or partial inability to think

abstractly. A retarded person's thinking process is very "concrete" and he does not easily transfer learning from one area or situation to another. It is this which creates his difficulty in distinguishing between appropriate and inappropriate, or legal and illegal, behavior. This limited ability to think abstractly can be dealt with by repeatedly exposing the retarded individual to contrived situations meant to make a certain point. This is effectively done through the use of role-playing and group discussions.

Vocational Training: In order to become fully independent, retarded persons require vocational training. Such training should not emphasize equipping the individual with a specific skill but, rather, should emphasize general skills that can be applied to a wide variety of occupations. The goals of a vocational training program should be: (1) to provide the person with an orientation toward work, (2) to determine, measure, and note the individual's work-related needs, assets, and limitations, (3) to help the individual become more aware of his vocational assets and limitations, and to develop a variety of necessary skills, and (4) to encourage stable work habits and increase the individual's tolerance for work.

The best tool for vocational training is a licensed sheltered workshop, which duplicates an actual industrial setting. We recommend that such a workshop be established within the correctional facility. The process of equipping, staffing, subcontracting, licensing, and funding a sheltered workshop can be a very complex operation, however, and should not be attempted without expert guidance and advice. For some offenders, a later stage of the training may involve connecting them with a sheltered workshop in the community but, ideally, most will be able to move directly into competitive employment during the later stages of their confinement.

The inmates should also be offered "pre-vocational training," which exposes him to such realities of the working world as job applications, social security and tax forms, labor unions, fringe benefits, job responsibilities, motivation to work, and taxes. A highly respected pre-vocational evaluation and training instrument is available. It is marketed by Singer Career Systems of Rochester, New York, and is called the Singer Job Survival Skills Manual and Kit.

Acadmeic Training: Cognitive or academic training should also be made available to retarded inmates and should, for the most part, be of a survival nature. An individual's reading, writing, and arithmetic skills should be developed, when possible, at least to the point where he is able to look for work in the classified ad sections of newspapers and to fill out job applications. It is also important that the retarded person be able to read public signs, directions, maps, and bill and safety instructions, and that he be able to fill out the forms necessary to receive community services. It is important not to challenge the individual to develop academically beyond his capa-

bilities, however, in order to avoid frustrating him.

Services: Group Counseling should be provided for all retarded inmates. Such counseling can be very beneficial to a retarded offender, making him see that he shares a common bond with others and mitigating his sense of alienation from his peers and from authority figures. A group counselor can plan a very important role as a model to his retarded clients, and should endeavor to become the symbol of a mature, responsible, candid, accepting person who is dedicated to the welfare of others. It should also be remembered that all staff members, both habilitative and security workers, can serve as models to the retarded inmates, and would do well to endeavor to set a good example.

Individual Counseling should also be available. Since retarded individuals seldom seek counseling, the counselor should be assertive in offering his services, prepared to employ a setting other than that overly dependent upon the verbal abilities of the client.

Full medical services are particularly important for retarded persons, since they are frequently afflicted with one or more physical handicaps. Discovery and/or treatment of such handicaps can be important factors in the development of the retarded individual's fullest potential.

It is not uncommon for retarded persons to be afflicted with speech or audio-logical impediments. Therefore, no well-designed program can lack the services of a speech pathologist or audiologist. Physical and Occupational Therapy are, similarly, services that should be made available to retarded inmates.

The retarded offender CAN be helped. With adequate programs, time, and patience, he can learn to become a contributing member of society. We know enough about mental retardation and how to deal with it to develop effective programs such as the one outlined above. To fail to implement such programs would be a great tragedy and nothing short of criminal.

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